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**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

In Re WAL-MART STORES, INC.  
WAGE AND HOUR LITIGATION

Case Numbers: C 06 02069 SBA

**CLASS ACTION**

CORRECTED NOTICE OF MOTION AND  
MOTION FOR AWARD OF INCENTIVE  
PAYMENTS TO PLAINTIFFS AND FOR  
AWARD OF ATTORNEYS' FEES AND  
COSTS; MEMORANDUM OF POINTS &  
AUTHORITIES IN SUPPORT THEREOF

This Document Relates To:

Case Nos.

C 06 02069 SBA (Smith) and  
CV 06 05411 (SBA) Ballard

**Judge: Hon. Saundra B. Armstrong**

Date : September 28, 2010

Time : 1:00 p.m.

Courtroom : 1, 4<sup>TH</sup> Floor

**ADDITIONAL PLAINTIFFS' COUNSEL**

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1 TO: DEFENDANT WAL-MART STORES, INC., ALL PARTIES HEREIN  
2 AND TO THEIR COUNSEL OF RECORD:

3 Please take notice that on September 28, 2010 at 1:00 p.m. in Courtroom number  
4 1 of the above-entitled court located at 1301 Clay Street, Fourth Floor, Oakland,  
5 California, Plaintiffs and their counsel will move the Court for Orders as follows:

- 6 1. Awarding each of the four named plaintiffs an incentive award of \$25,000;
- 7 2. Awarding Class Counsel attorneys' fees in the amount of \$28,666,666;
- 8 3. Awarding Class Counsel reimbursement of costs in the amount of  
9 \$572,754.85.

10 Said Motion shall be based upon this Notice of Motion, the attached  
11 Memorandum of Points & Authorities, the exhibits thereto, and the declarations of  
12 attorneys Marlin, Bradley, Hart, Pinney and the declarations of the four plaintiffs, and  
13 such further matters, both documentary and evidentiary, as may be presented at the  
14 hearing of said motion.

15 Dated: August 25, 2010

**MARLIN & SALTZMAN, LLP**  
**LAW OFFICES OF PETER M. HART**  
**BAILEY PINNEY PC**

16  
17  
18 By: /s/  
19 Louis M. Marlin of Marlin & Saltzman  
20 Attorneys for Plaintiffs and Plaintiff Class  
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1 **MEMORANDUM OF POINTS & AUTHORITIES**

2 **I. NATURE OF RELIEF SOUGHT**

3 By this motion, plaintiffs Danton Ballard, Nathan Lyons, Barry Smith and Michael Wiggins,  
4 and their attorneys, seek an order awarding them each an incentive payment of \$25,000, and awarding  
5 Class Counsel attorneys' fees in the amount of \$28,666,666.00 (equal to 33 1/3% of the gross settlement  
6 amount), plus reimbursement of costs and expenses in the amount of \$572,754.85.

7 These requests were detailed in the notice of settlement served upon class members (Exhibit  
8 1 hereto, at Section VI-C). As set forth in the Settlement Agreement of the parties, defendant will not  
9 object to the requested incentive awards or to a reasonable request for these awards. Plaintiffs and  
10 their counsel do not anticipate any such objection from defendant.

11 **II. INTRODUCTION AND SUMMARY OF ARGUMENT**

12 Plaintiffs and their counsel have devoted over four years of time to litigation of one of the most  
13 contentious and intensive class actions imaginable. The investigation and discovery of the failure of  
14 defendant's final pay system, which caused between approximately \$10 million and \$12 million of  
15 under payments to terminated class members<sup>1</sup>, thus triggering the substantial penalties and interest  
16 claims which were at the heart of this case, was uncovered as result of their willingness to dedicate the  
17 resources and personnel necessary to meet and successfully overcome each and every challenge raised  
18 by the various law firms which served at one point or another as defendant's litigation counsel.<sup>2</sup> By  
19 establishing this under payment and uncovering evidence which would potentially expose Defendant  
20 to statutory penalties, plaintiffs and their counsel have succeeded in obtaining a settlement with a  
21 potential recovery of between seven and eight and a half times the underlying claim, for a potential  
22 total of \$86 million. The request for an incentive award of \$25,000 each for the four plaintiffs, and  
23 attorneys fees equal to 1/3 of the maximum potential recovery is both appropriate and reasonable.

24 <sup>1</sup>Defendant's expert appears to have estimated approximately \$10 million in under payments,  
25 and plaintiffs' expert estimated approximately \$12 million.

26 <sup>2</sup>In addition, defendant has asserted that it also employed an estimated 50 "contract" attorneys  
27 to conduct the massive document review and production ordered in this case - the same documents  
28 which then had to be reviewed by plaintiffs' counsel, over an approximately 8 month period of  
continuous work.

1 To reach this result, Class Counsel devoted 26,701.7 hours of attorney and para legal time, and  
 2 spent over \$500,000 of their own funds for the benefit of the Class.

### 3 III. REQUEST FOR INCENTIVE AWARDS

4 As established by the declarations of Danton Ballard, Nathan Lyons and J. Dana Pinney, filed  
 5 in support of the motion for final approval, the four plaintiffs contributed a great deal of their time and  
 6 effort to this case. They responded to written discovery and had their depositions taken. They served  
 7 as liaison between Class Counsel and the Class Members, made themselves available to Class Counsel  
 8 whenever needed, assisted in the analysis and evaluation of documents and evidence, participated in  
 9 multiple meetings and telephone conferences with Class Counsel, and assisted in the evaluation of  
 10 Class Member interviews. Defendant does not object to this incentive award request.

11 Furthermore, Plaintiffs, by taking the lead role in prosecuting these claims against their former  
 12 employer, assumed a risk to their standing and reputation within the business community. In today's  
 13 internet driven society, any potential employer who conducts an internet search of any of the plaintiffs  
 14 in connection with a job application will easily learn that each served as a representative plaintiff in  
 15 an action that will potentially cost this defendant \$86 million. It is likely that the courage evidenced  
 16 by these plaintiffs may well result in their being denied future employment, without ever knowing that  
 17 their participation in this case was the cause of the same. It is recognized that "... retaliation against  
 18 employees for asserting statutory rights under the Labor Code is widespread," and that "retaliation .  
 19 . . cause(s) immediate disruption of the employee's life and economic injury." (*Gentry v. Superior*  
 20 *Court* (2007) 42 Cal. 4th 443, 461.)

21 Incentive awards to the class representatives are not only authorized, but entirely appropriate.  
 22 (*Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003).) "Because a named plaintiff is an essential  
 23 ingredient of any class action, an incentive award is appropriate if it is necessary to induce an  
 24 individual to participate in the suit." (*Cook v. Niedert*, 142 F. 3d 1004, 1016 (7th Cir. 1998); see also  
 25 *In re Linerboard Antitrust Litig.*, 2004 WL 1221350 (E.D. PA June 2, 2004), amended, MDL No.  
 26 1261, 2004 WL 1240775 (E.d. PA June 4, 2004) [Where "class representatives have conferred benefits  
 27 on all other class members . . . they deserve to be compensated accordingly."]; *Rodriguez v. West Publ.*  
 28 *Corp.*, 2007 WL 2827379 (C.D. Cal. Sept. 10, 2007), aff'd in part, rev'd in part *sub nom. Rodriguez*

1 *v. West Publ. Corp.* 563 F.3d 948 (9<sup>th</sup> Cir. 2009)[incentive awards should compensate for risks taken,  
2 such as “retaliation . . . , discrimination, trouble finding employment, and significant financial risk.”].)

3 The proposed incentive awards requested herein total about 1/10<sup>th</sup> of 1% of the gross settlement  
4 value. Incentive awards of 1% of the total settlement fund are routinely approved, such that these  
5 requests are 10 times smaller. (See, e.g., *Brotherton v. Cleveland*, 141 F.Supp.2d 907 (S.D.Ohio,  
6 2001) [approving \$50,000 enhancement based on \$5.25 million settlement]; *Enterprise Energy Corp.*  
7 *v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 250-51 (S.D. Ohio 1991) [awarding \$300,000  
8 in enhancements based upon \$30 million settlement]; *In re Dun & Bradstreet Credit Services*  
9 *Customer Lit.*, 130 F.R.D. 366, 373-74 (S.D. Ohio 1990) [awarding \$215,000 to several class  
10 representatives out of an \$18 million fund].)

11 Plaintiffs willingly assumed great risk by acting as Class Representatives, and performed  
12 admirably in that role, as a result of which the Class has achieved a significant monetary settlement.

#### 13 **IV. ATTORNEYS’ FEES AND COSTS**

##### 14 **A. The Award Requested.**

15 The fee sought relates to all efforts expended by Class Counsel for the complete handling of  
16 this case, including any additional work remaining to be performed by Class Counsel in securing final  
17 Court approval of the Settlement, and making sure that the Settlement is fairly administered and fully  
18 implemented.

19 Class Counsel in this case are highly experienced in class action litigation, with a particular  
20 emphasis on wage and hour litigation, as detailed in the contemporaneously filed declarations of Louis  
21 M. Marlin, Marcus J. Bradley, Peter M. Hart and J. Dana Pinney, which are incorporated herein by  
22 reference. Throughout this litigation, Defendant has been represented by highly competent counsel  
23 who vigorously defended their client’s position. At various times, defendant has been represented by:  
24 (1) Lafayette & Kumagai LLP, (2) Orrick, Herrington & Sutcliffe LLP, (3) Morgan, Lewis & Bockius  
25 LLP, (4) Lane Powell LLP [who remain counsel of record], [5] Gibson, Dunn & Crutcher, LLP [who  
26 remain counsel of record], and [6] Greenberg Traurig [counsel of record in the initial months of the  
27 Central District litigation in 2006, and much later, lead counsel in connection with the settlement of  
28 the consolidated matters before this Court]. These highly respected firms challenged Class Counsel

1 at every step of this case. Each challenge was met and overcome.

2 An enormous amount of work on the part of Class Counsel went into achieving this remarkable  
3 resolution. The case was actively litigated over a period of approximately four years, until the  
4 settlement was first agreed to. Since reaching the settlement, additional work has been required to  
5 bring it to the point of moving for final approval. The work will be outlined in detail below, and  
6 together with the analysis of all the factors governing attorney fee awards, class counsel believe that  
7 the effort and result justify the requested 33 1/3% fee sought herein.

8 As a secondary “backup” to the percentage of the common fund requested, class counsel are  
9 also providing this Court with a detailed hourly analysis of the work rendered. Exhibit 2, filed  
10 contemporaneously herewith and under separate cover, is a 41 page chart, entitled **Time and Task**  
11 **Chart**, setting forth in detail the tasks performed and hours for all such tasks. It is being presented in  
12 this manner so as to enable this Court to easily follow and understand the extent of the hourly efforts  
13 required to bring this matter to a successful conclusion, as well as to assure itself that counsel took all  
14 reasonable steps to avoid duplication of efforts, while working towards the common goal of achieving  
15 the best possible result for the class.

16 The **Time and Task Chart** provides this Court with significant details concerning the efforts  
17 by Class Counsel.<sup>3</sup> It presents a compilation of all the time and the tasks to which the work was done,  
18 set forth in a manner that enables the reader to follow the entire flow of the litigation, and the services  
19 provided. The following represents a broad summary of those efforts, with perhaps a greater emphasis  
20 upon those activities that would not be likely to be reflected in the Court’s docket, but which  
21 nonetheless drove the entire litigation and the eventual settlement.<sup>4</sup>

## 22 **B. Nature of the Case, and its Litigation History**

23 The matter before this honorable court involves two cases consolidated by agreement of the  
24 parties. The first, *Smith, et.al. v. Wal-Mart Stores, Inc.* was filed in the District Court for the Northern  
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26 <sup>3</sup>References hereafter to “Category” or “Categories” refer to the specifically identified and  
27 numbered categories found in the **Time and Task Chart**.

28 <sup>4</sup>A great deal of this section of this Memorandum is taken *verbatim* from the Plaintiffs’  
Motion for Preliminary Approval since that document contained a comprehensive history of the case.

1 District of California on March 20, 2006. (Categories 1 and 3) The second case, *Ballard, et.al v. Wal-*  
 2 *Mart Stores, Inc.*, was filed in the Central District on May 17, 2006. (Categories 2 and 4) Both actions  
 3 sought similar recovery related to Wal-Mart's failure to pay various types of earned wages upon  
 4 termination of employment. Each sought penalties under California *Labor Code* §203, as well as other  
 5 remedies. (Category 6)

6 Throughout the course of this litigation, there were always two simultaneously running tracks  
 7 of case development. The first track related to that which was most evident to the Court through the  
 8 pleadings filed (as evidenced by the Court's extensive docket], and the eventual motion to certify the  
 9 case - this was the portion of the litigation involving ongoing battles over questions of whether  
 10 common issues of law and fact existed, such that class certification and an eventual class trial would  
 11 be appropriate. In relation thereto, this Court was asked to rule on matters including the weight to be  
 12 attributed to, and the admissibility of expert testimony; the statistical and computer driven conclusions  
 13 reached by the competing experts; and through numerous discovery battles before Magistrate Judge  
 14 Zimmerman, what documents and evidence defendant should be compelled to produce. All of class  
 15 counsel's work in that track of the litigation was evident to both this Court and/or Magistrate Judge  
 16 Zimmerman. (Categories 6, 12 - 14)

17 However, while that track of the case was critical to the pleadings, and to the eventual  
 18 certification of the case, it was certainly not the only factor in moving the case towards its ultimate  
 19 resolution. Contemporaneously, Class Counsel had to concentrate on developing the facts and  
 20 evidence needed to prove to the eventual trier of fact not only that vacation and personal time were not  
 21 paid properly, (track one), but further that Wal-Mart's alleged failures in that regard would meet the  
 22 "wilful" standard under *Labor Code* §203, so as to support an award of continuing wages (penalties)  
 23 under that code section.

24 Since the highest value to the class members in this case lay in the penalties, the development  
 25 of that phase of the case was the critical second track of this action that was ongoing since day one,  
 26 but always behind the scenes. In that regard, most of the many depositions taken of the corporate  
 27 witnesses, and the vast majority of the documents produced and reviewed, related to the *Labor Code*  
 28 §203 claim. Fortunately, through the detailed and painstaking analysis of the over one million

documents produced, and the critical liability depositions taken relating to defendant's practices and an understanding of the key documents, plaintiffs were able to find support for the presentation of the penalty claim.<sup>5</sup> Had Class Counsel not been able to expend the huge effort necessary to investigate and analyze this case, the support for arguing a violation of section 203 would have been lacking, leaving only the unpaid earnings claim which, while in the millions, would have been far surpassed by the value of the attorney and para legal hours, and the costs, devoted by them on behalf of the class. (Categories 7, 8, 10, 12).

In the course of the document production, Wal-Mart produced most of its documents in what is known as "TIF" format. Such documents are essentially photocopies, or pictures, of the original pages. As such, they are not "searchable" via computer programs. Absent the "search" capability, it would be extremely problematic for class counsel to cross-compare, and cross-search, the voluminous records, and to bring the documents into any meaningful format within the tight time frames governing the scheduled certification filing, and then the trial date.

Accordingly, counsel worked with an outside vendor to have the documents converted to a searchable format using "ocr" (optical character recognition) programing, thus enabling all the documents to be accessed and searched with keyword searches so as to locate documents relevant to the wage claims, and also supportive of the penalty claim. The vendor also generated "load files", enabling class counsel to effectively merge the data into their database software. This was done at great expense, and was literally being handled on a weekly turnaround, as the documents were being serially produced by the defendant over the course of many months. By doing this, what would clearly have been an impossible task was reduced to simply a herculean task - and one that was successfully completed by plaintiffs' counsel.

Because of this effort, class counsel were able to find the 100 or so "needles in a haystack" they needed to bring together the second track of the case, and to be prepared to present the section 203 claim to the finder of fact at trial. These documents included unique internal emails relating to

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<sup>5</sup>By example, of the 27 separate deposition sessions taken in cities around the country, Class Counsel took 22 depositions and defended 5. Of the 22 taken by Class Counsel, only 7 concentrated primarily on class certification issues (Category 13), while the rest were primarily liability related (Categories 8, 14 and 22).

1 vacation pay problems, policy memos, and departmental memos dealing with these issues. By the time  
 2 the parties agreed to the second mediation attempt while the appellate proceedings were pending,  
 3 plaintiffs were capable of demonstrating to the defendant that they were fully ready, willing and able  
 4 to present a strong penalty argument at trial - one which could expose defendant to the realistic  
 5 possibility of such an award being made at trial. While Class Counsel would not presume to speak for  
 6 defendant or its highly competent counsel, it is more than reasonable to assume that this potential  
 7 exposure to penalties directly impacted defendant's willingness to agree to pay up to 8 and a half times  
 8 the amount that it believed had been underpaid.

9 The two separate tracks of the litigation unfolded during the action in the following manner.

### 10 **C. The Pleadings and Pleading Motions**

11 The cases were related in September, 2006 before this Court. After some significant early  
 12 rounds of motion practice concerning the pleadings, the parties stipulated to the filing of a joint  
 13 Consolidated Class Action Complaint, which was accomplished in January of 2007. An Amended  
 14 Consolidated Class Action Complaint was filed (based upon the stipulation of the parties) in March  
 15 of 2007. (Category 6)

16 Thereafter, defendant brought a Motion to Dismiss, which was the subject of lengthy briefing  
 17 by both sides. The motion was granted in part and denied in part, with plaintiffs being permitted to  
 18 file a further amended complaint, which was done. The parties then stipulated to strike the third claim  
 19 for relief (for overtime pay) and to strike allegations related thereto based upon the fact that an earlier  
 20 filed action (*Newland v. Wal-Mart Stores, Inc.*) addressed to those issues and was pending in another  
 21 District Court. This Court entered an order pursuant to that stipulation, and the case was then at issue.  
 22 (Category 6)

23 On October 10, 2007, plaintiffs filed their Motion for Class Certification, along with all  
 24 supporting declarations (including that of their expert Martin Shapiro, Ph.D.), various documents, a  
 25 proposed trial plan, etc. (Categories 20 and 21) Defendant's Opposition to the certification motion,  
 26 supported by over 40 declarations (plus the declaration of its expert Denise Martin, Ph.D.), an  
 27 opposition to plaintiffs' trial plan and a memorandum of points and authorities, was filed on November  
 28 20, 2007. Plaintiffs filed their Reply fourteen days later on December 4, 2007. (Category 21)

1 Thereafter, additional motion practice ensued, concerning the defendant's filing of a "sur-reply", and  
 2 a motion by defendant to strike the Supplemental Declaration filed by Dr. Shapiro in connection with  
 3 plaintiffs' Reply memorandum.

4 On February 12, 2008, this Court issued its order granting in part and denying in part plaintiffs'  
 5 motion for class certification. The Court granted the motion to certify with regard to sub-classes 1 and  
 6 2, and denied the motion as to sub-class 3.<sup>6</sup>

7 The Court's Order re certification triggered an intense reaction by Wal-Mart. (Category 22)  
 8 Following the order, extensive negotiations between the parties occurred relative to the form and  
 9 content of the proposed Notice, and related post-certification issues. Eventually, additional motion  
 10 practice was conducted concerning these matters. Thereafter, defendant sought a stay of all  
 11 proceedings. On March 7, 2008, defendant filed a motion to stay the case pending resolution of  
 12 appellate proceedings, and contemporaneously sought leave to appeal this Court's certification ruling.  
 13 In addition, on March 13, 2008, defendant filed two motions for summary judgment/adjudication; one  
 14 as against each of the three representative plaintiffs, and another as against the class a whole. Plaintiffs  
 15 filed their oppositions to the same on April 1, 2008, and replies were filed by defendant. At that time,  
 16 the trial of this matter was scheduled for June 30, 2008, only three months later. The trial date was  
 17 later continued for several months.

18 On May 15, 2008, while the parties were engaged in extensive final pre-trial preparations, the  
 19 Ninth Circuit issued its order granting Wal-Mart's petition for leave to appeal this Court's order  
 20 concerning class certification. Thereafter, the parties stipulated to stay further proceedings herein until  
 21 resolution by the Ninth Circuit.

22 Full briefing and oral argument before the Ninth Circuit was then undertaken, and the matter  
 23 fully submitted to that court. (Category 25) Oral argument before the Ninth Circuit Court of Appeals  
 24 was held on October 8, 2009. Thereafter, with the matter fully submitted and pending a decision, the  
 25 parties engaged in two full days of mediation, several months apart, and eventually reached the

26 <sup>6</sup>As part of the settlement reached by the parties, even the approximately 26,000 employees  
 27 who received all wages to which they were due will be entitled to share in the settlement. This  
 28 inclusion, plus the addition of 4,000 employees from the 13 Distribution Centers in California,  
 represents the slightly expanded settlement class.

1 settlement being presented herein. At the request of the parties, and as a result of the settlement, the  
 2 Ninth Circuit panel issued an order under seal on March 20, 2010 staying further proceedings pending  
 3 this Court's determination as to preliminary and final approval of the settlement.

4 **D. Discovery and Investigation**

5 **(Categories 1, 2, 7, 8, 10 - 17, 19, 20, 23)**

6 Both prior to and following certification, discovery was ongoing at a hectic pace. To say that  
 7 a great deal of effort was devoted to discovery and investigation would be an understatement of  
 8 monumental proportions. As the almost 400 entries in the Court's docket in this case attests, the  
 9 discovery phase alone resulted in Magistrate Judge Zimmerman issuing six different discovery orders  
 10 to resolve substantial discovery disputes. (Category 12) All of the Orders were in favor of the  
 11 plaintiffs, and required the defendant to either respond further or produce additional documents, where  
 12 it had asserted objections claimed to be improper by the plaintiffs. Plaintiffs' counsel left no stone  
 13 unturned in pursuit of the evidence deemed necessary to support not only the primary claim relating  
 14 to unpaid vacation and other wages, but also in relation to the penalty claims flowing therefrom. This  
 15 Court rejected all challenges which defendant filed in regard to the various discovery orders issued by  
 16 Magistrate Judge Zimmerman.

17 Ultimately, in response to several of the discovery orders, defendant produced substantially  
 18 more than 1 million pages of corporate records and documents, including emails, manuals, directives  
 19 relating to vacation and other pay plans, and documents from approximately 200,000 individual  
 20 personnel files. (Categories 10, 16) According to papers submitted by counsel for Wal-Mart at the  
 21 time of these discovery battles, Wal-Mart hired and trained teams of contract attorneys to locate and  
 22 review all the documents it was ordered to produce, and carried out the process of responding to the  
 23 production orders over a period of almost six months. Wal-Mart's counsel asserted that these  
 24 attorneys were able to review between 800 and 1,100 pages of records per day.<sup>7</sup> This calculates to  
 25 approximately 1,000 days (four years) of attorney time, if only one person was devoted to the task.  
 26 In real terms, since a team was put together, then this would be the equivalent of having eight attorneys  
 27 work full time on the document review for more than six straight months.

28 <sup>7</sup>Docket No. 127, Letter from Lynne C. Hermle to Judge Zimmerman, August 17, 2007.

1 This effort by the defendant is noted because on the opposite side of the production, as the  
 2 documents were being received by plaintiffs on the rolling production basis, Class Counsel then had  
 3 the equally herculean task of reviewing and analyzing the very same documents, without the luxury  
 4 of hiring 50 or more contract attorneys. (Category 10) As described above, in order to achieve this  
 5 review in a timely and effective manner, the documents produced had to be converted from the TIF  
 6 format in which they were produced, to a searchable format. This was done on a weekly basis by the  
 7 outside vendor selected by class counsel. This analysis continued even while the district court  
 8 proceedings were stayed pending the Ninth Circuit appellate proceedings - and did not cease until the  
 9 case was settled at the final mediation held on February 27, 2010.

10 Contemporaneous with the extensive document production, defendant also produced over  
 11 1,000 pages of "privilege logs" relating to the hundreds of thousands of documents produced.  
 12 (Category 10)

13 Each log was printed in minute single spaced 8 point type (the size of the font used  
 14 in this indented paragraph) and cross-referenced many thousands of related pages  
 of documents.

15 All the logs were reviewed and analyzed by class counsel, with a view towards potential  
 16 motions to challenge the asserted privileges. There were extensive debates during depositions relating  
 17 to the many privileges asserted by defendant in its document production, as plaintiffs were always  
 18 concerned that critical documents might be withheld under these privilege assertions, and thus never  
 19 come to light. Thus, while motions were never made due to the imposition of the stay by the appellate  
 20 proceedings, the review and research of these issues was ongoing throughout. An exemplar privilege  
 21 log page is attached as Exhibit 3 to this Motion. Since Class counsel intended, upon the anticipated  
 22 successful conclusion of the appellate proceedings, to ask that the Court set a trial date in a relatively  
 23 short time frame, all reviews of the privilege matters had to and were being completed during the trial  
 24 court stay pending appeal.

25 Equally important to the investigation and development of the case was the analysis of the  
 26 numerous databases of computerized data provided by Wal-Mart - all of which was fully assembled,  
 27 re-organized and studied by plaintiffs' expert. (Category 20) Due to the manner in which the data was  
 28 stored by Wal-Mart, and produced to the plaintiffs, Dr. Shapiro literally had to re-create the databases

1 in order to reach his conclusions. Many months of his time were spent doing so, and then analyzing  
 2 all the resulting reports in order to reach his conclusions. Class counsel spent hundreds of hours  
 3 working with Dr. Shapiro, and learning from him. Many days were then spent studying defendant's  
 4 expert's rebuttal conclusions. Predictably, her conclusions differed from plaintiffs' expert's  
 5 conclusions. Several days were spent in depositions of Dr. Shapiro and Dr. Martin, as well as in  
 6 analyzing the strengths and weaknesses of their conclusions. (Categories 14 and 19)

7 In addition, both sides engaged in other extensive written and deposition discovery. Plaintiffs  
 8 conducted twenty one deposition sessions of various non-expert witnesses (both PMQ's and selected  
 9 witnesses), all in Bentonville, Arkansas, since these witnesses could not be compelled to come to  
 10 California. (Categories 8 and 20) Counsel often spent full weeks there at a time, working through the  
 11 various levels of deponents necessary to develop the claim for penalties arising from the alleged unpaid  
 12 vacation and other wages. Often, two class counsel would be there together in order to enable the best  
 13 possible examinations of the witnesses that were possible so that the attorney taking a deposition was  
 14 assisted by another attorney equally familiar with the case, with the prior depositions, as well as the  
 15 massive amount of documents produced. Wal-Mart regularly deployed four and five lawyers for each  
 16 deposition taken by plaintiffs. For two particularly critical corporate witnesses who were deposed on  
 17 matters relating to computer program and data issues, class counsel flew their expert, Dr. Shapiro, to  
 18 Bentonville from Atlanta, so that he could assist during the actual taking of those depositions as they  
 19 were occurring. The defendant took the depositions of the four named plaintiffs in Menlo Park,  
 20 California, as well as Dr. Shapiro in Atlanta, Georgia.

21 All of the investigation and discovery described above was conducted by plaintiffs' counsel  
 22 with the expectation that the matter would ultimately have to be resolved by trial. Wal-Mart's  
 23 reputation as a formidable and tenacious litigation foe was well known before the case was filed, and  
 24 thus trial presentation was an underlying theme of all the work done by class counsel from day one.  
 25 Every step of the action was hard fought, and contributed to both side's being able to develop a full  
 26 and complete understanding of all the legal and factual issues, as well a full appreciation of each side's  
 27 respective strengths and weaknesses.

28 ///

1                   **E.      Mediation**

2           After substantial early discovery had been completed, but before the plaintiffs' motion to  
 3 certify the class had been filed, plaintiffs agreed to defendant's request that they participate in  
 4 mediation in an attempt to resolve the case. (Categories 7 - 9) The parties met in San Francisco,  
 5 before attorney Mark Rudy, a well respected attorney-mediator specializing in wage and hour class  
 6 actions. That one day mediation did not result in any resolution. However, even the unsuccessful  
 7 mediation was helpful, in that it allowed the parties an opportunity to exchange ideas and positions in  
 8 an informal setting, as to the relevant issues in the case, and opened the door to the possibility of  
 9 further meetings. Thereafter, as outlined above and throughout the **Time and Task Chart**, extensive  
 10 further discovery was conducted, the certification motion was eventually granted, trial preparation was  
 11 ongoing, and then the appellate review began.

12           Oral argument in the Ninth Circuit was held on October 8, 2009, after the case had been fully  
 13 brief by the parties and by *amicus*. (Category 25) Shortly thereafter, Wal-Mart's Coordinating  
 14 National Counsel became directly involved in the case and the parties agreed to again attempt to  
 15 resolve the case by mediation. (Category 26) While the appellate decision on certification was  
 16 pending, the two sides agreed upon a mediator, exchanged extensive mediation briefs, and engaged  
 17 in the process which led to the settlement. The parties selected the Hon. Layne Phillips (Ret.), a  
 18 former United States District Court Judge from Oklahoma, now practicing out of the Newport Beach  
 19 office of Irell & Manella, to be the mediator. Judge Phillips had previously mediated many other Wal-  
 20 Mart matters, and has been successful in resolving many such cases.

21           Mediation began on December 4, 2009, in Judge Phillips' offices in Newport Beach,  
 22 California. After a full day session, the parties were unable to reach an agreement. However, because  
 23 progress had been made towards a possible resolution, it was agreed that a second session would be  
 24 scheduled. In light of the difficulty clearing dates for the eleven lawyers and the mediator who would  
 25 be attending the next mediation session, as well as the corporate executives of Wal-Mart who needed  
 26 to be present in order to make the decision necessary to achieve a settlement, the parties agreed to meet  
 27 on Saturday, February 27, 2010 in Bentonville, Arkansas, which is the location of Wal-Mart's  
 28 corporate headquarters.

1 During the time that elapsed between the first mediation with Judge Phillips in December and  
 2 the second in February, numerous discussions were held between plaintiffs' counsel and Wal-Mart's  
 3 Coordinating National Counsel, Brain Duffy, Esq., of the Colorado office of Greenberg Traurig. As  
 4 a result of these many discussions, which included personal meetings between counsel, issues  
 5 continued to be narrowed even prior to the February 27 session.

6 The second session in Bentonville was again presided over by Judge Phillips, this time with  
 7 the assistance of yet another retired District Court Judge from Oklahoma, the Hon. Thomas R. Brett.  
 8 Plaintiffs were represented by 6 attorneys - Louis Marlin, Stanley Saltzman and Marcus Bradley of  
 9 Marlin & Saltzman, attorney Peter Hart of the Law Offices of Peter M. Hart, and A.E. "Bud" Bailey  
 10 and J. Dana Pinney of Bailey Pinney, PC. The representative plaintiffs were available telephonically.  
 11 Wal-Mart was represented by Mr. Duffy, his partner Ms. Naomi Beer, attorney Rudy Englund from  
 12 the Lane Powell firm, attorney Mark Perry from Gibson, Dunn & Crutcher's Washington office, as  
 13 well as attorney Kurt Krafsky of the Wal-Mart office of general counsel. Wal-Mart also had two high  
 14 ranking executives present, and others available by phone.

15 After approximately 13 uninterrupted hours of negotiations on February 27, an agreement in  
 16 principle was finally reached, and a "term sheet" was signed by counsel for both sides late in the  
 17 evening.

18 The key terms of this hard fought settlement provide exceptional benefits to the class members,  
 19 and amount to nothing less than huge victory. With an underlying claim of between \$10 million and  
 20 \$12 million in unpaid wages, defendant has agreed to a maximum payment of \$86 million. Within the  
 21 time frame established by this Court's earlier order, a separate Motion For Final Approval will be filed  
 22 by September 14, 2010. However, the key parts of this settlement which establish the success of the  
 23 efforts of Class Counsel are noted as follows:

- 24 a. Defendant will pay a maximum settlement amount of \$86 million, which sum includes  
 25 payments made to claimants, administration costs, awards of attorneys' fees and costs,  
 26 and incentive awards to the named plaintiffs.
- 27 b. The settlement includes Wal-Mart's acknowledgment that the litigation acted as a  
 28 catalyst for Wal-Mart's implementation of remedial measures which have resolved the

final pay problems that form the underlying basis of this case. For a period of at least three years from the Settlement Effective Date, Wal-Mart will continue to use its improved computer technology, the purpose of which is to assure accurate final payments to terminating California employees. Wal-Mart shall continue to use this technology, or other technology that Wal-Mart reasonably considers as superior for this purpose, during this time frame, and its use of the same will be reported to plaintiffs' counsel.

- c. Each Class Member who returns a valid and timely Claim Form will be entitled to receive a portion of the settlement under the following formula:

**Salaried Associates Sub-Class:**

Each timely claimant will receive a payment of \$600.

**Distribution Center Sub-Class:**

Each timely claimant will receive a payment of \$300.

**Hourly Associates Sub-Class:**

The amount remaining after payment to claimants in the Salaried Associates Sub-Class and the Distribution Center Sub-Class is designated as the "Hourly Net Settlement Amount." From this Hourly Net Settlement Fund, no Claimant shall receive less than Fifty Dollars (\$50) and no Claimant shall receive more than Six Hundred Dollars (\$600). Each hourly associate as to whom the records indicate any unpaid wages exist will receive a proportionate share of the funds available, based upon the amount they are owed in relation to the total amount owed to the entire Hourly Associates Sub-Class.

- d. A highly beneficial term of the settlement requires that the Claims Administrator mail a follow up notice ("**reminder post-card**") to those Class Members who have not responded with the return of either a Claim Form or a Request for Exclusion forty five (45) days before the expiration of the claim period, i.e. exactly half way through the process.

All of the above validates the request for an award of attorneys' fees.

**F. Post Mediation Settlement Activities (Category 27)**

As the Court can no doubt imagine, an \$86 million settlement, although agreed to in principle at a mediation, requires ongoing negotiations concerning the specific and detailed terms and conditions of a formal settlement agreement. The drafting of, and process of reaching agreeing upon, such items as class notice, publication notice, the claim form, etc. took a considerable amount of time. In addition, Class Counsel prepared and filed the required Motion for Preliminary Approval of the settlement, and obtained an order for the same from this honorable Court.

As the settlement process continues, Class Counsel will continue to work with the Claims Administrator, and defendant's national counsel, to see that all of the terms and conditions of the settlement are met. (Category 27) Class Counsel will continue to report to this Court concerning the same until all aspects of the settlement process have been completed.

**V. ATTORNEY FEE AWARDS IN COMMON FUND CASES**

Class Counsel seek an attorney fee award based on a percentage of the gross recovery, which is appropriate, and even desirable in cases like this. As stated in *Newberg on Class Actions, Fourth Edition*, vol. 4, p. 556, §14.6:

Unlike the lodestar method which can encourage class counsel to devote unnecessary hours to generate a substantial fee, under the POR [percentage of recovery] method, the more the attorney succeeds in recovering money for the client, and the fewer legal hours expended to reach that result, the higher dollar amount of fees the lawyer earns. Thus, one of the primary advantages of the POR method is that it is thought to equate the interests of class counsel with those of the class members and encourage class counsel to prosecute the case in an efficient manner.

See, *Boeing Co. v. Van Gemert* 444 U.S. 472, 478 (1980). The purpose of this equitable doctrine is not only to avoid unjust enrichment of counsel but also to spread litigation costs proportionally among all the beneficiaries so that the active beneficiary does not bear the entire burden alone. *Vincent v. Hughes Air West, Inc.* 557 F.2d 759, 769 (9th Cir. 1977).

**A. The Percentage Fee Has Eclipsed the Lodestar Method of Fee Calculation**

The Common Fund Doctrine is predicated on the principle of preventing unjust enrichment. It provides that when a litigant's efforts create or preserve a fund from which others derive benefits, the litigant may require the passive beneficiaries to compensate those who created the fund. Both State and Federal courts in California have embraced this doctrine. *Vincent v. Hughes Air West, Inc.* supra,

1 769.

2 The Common Fund Doctrine is the oldest exception to the American rule of fee  
3 shifting.

4 The Common Fund exception is grounded in the historic power of equity to permit the  
5 trustee of a fund or property (or a party preserving or recovering a fund for the benefit  
6 of others, as well as himself or herself) to recover costs, including attorneys fees.  
Those costs and fees are paid out of the fund or property itself, or directly from the  
other parties enjoying the benefit. R. Pearle, *California Attorney Fee Awards* (CEB,  
1993) §7.4, p. 7-5.

7 It is clear that the availability of \$86 million to the class herein constitutes a substantial  
8 common fund. This is an enormous recovery, particularly in light of the fact that the underlying claim  
9 of unpaid wages is between \$10 million and \$12 million. Under the foregoing doctrine, courts have  
10 historically and consistently recognized that class litigation is increasingly necessary to protect the  
11 rights of individuals whose injuries and/or damages are too small to economically justify individual  
12 representation. In *Paul, Johnson, Alston & Hunt v. Gaulty* (9th Cir. 1989) 886 F.2d 268, at 271, the  
13 Ninth Circuit embraced this principle when it stated:

14 Since the Supreme Court's 1885 decision in *Central Railroad & Banking Co. of Ga.*  
15 *v. Pettus*, 113 U.S. 116, 5 S. Ct. 387, 28 L.Ed. 915 (1885), it is well settled that the  
16 lawyer who creates a common fund is allowed an extra reward, beyond that which he  
17 has arranged with his client, so that he might share the wealth of those upon whom he  
has conferred a benefit. The amount of such a reward is that which is deemed  
'reasonable' under the circumstance.

18 Accordingly, in the determination of a reasonable common fund fee award, courts award fees  
19 to serve as economic incentive for lawyers to bring class actions in order to achieve increased access  
20 to the judicial system for meritorious claims and to enhance deterrents to wrongdoing. See A. Conte,  
21 *Attorney Fee Awards*, 2nd Ed. 1993, 104, p.6. In this case, it would have been difficult, if not  
22 impossible, for all these former Wal-Mart employees to bring separate actions for the small amounts  
23 of unpaid compensation. In fact, it cannot be denied that the vast majority of class members likely had  
24 no idea that they had been shortchanged in their final pay. Collectively, the result has been that each  
25 class member who submits a claim will receive between \$50 and \$600. When the Ninth Circuit held  
26 that the Common Fund Doctrine was available in ERISA cases, the court echoed the foregoing  
27 sentiment:

28 Having determined that risk multipliers remain available in common fund cases after

1 *Dague*, we further note that we have held, in pre-*Dague* case, that a risk multiplier is  
 2 not merely available in common fund cases but mandated, if the court finds that  
 3 counsel had no sure source of compensation for their services...Moreover, we have  
 4 observed that the need for such an adjustment is particularly acute in class action suits.  
 The lawyers for the class receive no fee if the suit fails, so their entitlement to fees is  
 inescapably contingent. *Florin v. Nations Bank of Georgia* (9th Cir. 1994) 34 F.3d  
 560, 564. (Emphasis added)

5 As will be discussed in greater detail in section V - C of this Memorandum, when this case was  
 6 originally filed, not only was it inescapably contingent, but the prospect of a long drawn-out battle with  
 7 defendant was almost a certainty. This case was indeed hard fought. The defendant's various law  
 8 firms asserted all available defenses and challenged Class Counsel in every area properly available to  
 9 them. In the face of these issues, Class Counsel pursued this matter on behalf of the representative  
 10 plaintiffs, and the proposed class, and achieved a significant result for the entire class. It is respectfully  
 11 submitted that the result more than justifies the fee requested.

12 California clearly encourages attorneys to take the enormous risks of time and money necessary  
 13 to vindicate the public interest, and to protect the public policies underlying the wage and hour laws.  
 14 To fulfill this policy, California law provides that attorney fee awards should be equivalent to fees paid  
 15 in the legal marketplace to compensate for the result achieved and risk incurred. See, *Lealao v.*  
 16 *Beneficial Cal., Inc.* 82 Cal. App.4th 19 (2000).

17 In cases where class members present claims against a potential maximum settlement fund, the  
 18 appropriate method for determining the percentage of fees to be awarded to counsel is based upon the  
 19 potential recovery available to the class, not the actual claimed amount. "In *Boeing Co. V. Van Gemert*  
 20 [444 U.S. 472 (1980)], the Supreme Court settled this question by ruling that class counsel are entitled  
 21 to a reasonable fee based on the funds potentially available to be claimed, regardless of the amount  
 22 actually claimed." *Newberg on Class Actions, supra*, at page 570.

### 23 **B. Evolution of the Percentage Method.**

24 Ever since the Common Fund Doctrine found its genesis in *Trustees v. Greenough*, 105 U.S.  
 25 527 (1881), courts have awarded fees on a percentage basis. In arriving at reasonable percentage fee  
 26 awards, courts consider a variety of factors, but focus on the particular circumstances of the case in  
 27 fixing a percentage above or below a benchmark. Here, an upward adjustment from the 9<sup>th</sup> Circuit  
 28 benchmark of 25% is clearly justified.

During the 1960s and early 1970s following the 1966 amendments to Rule 23, the size of settlement funds began increasing significantly and the fees awarded pursuant to the percentage method, taken out of context, were criticized by commentators and the general press. Then, in 1973, the revision for the Manual for Complex Litigation proposed that all common fund fee awards be based on time reasonably expended on the action. This concept was then embraced in *Lindy Bros. Bldrs., Inc. of Phila. v. American R. & R. San Corp.*, 487 F.2d 161 (3rd Cir. 1973), and *Lindy II*, 540 F.2d 102 (3<sup>rd</sup> Cir. 1976). Thereafter, a large number of courts adopted *Lindy's* rationale, and courts generally began awarding fees based on the actual time expended (the lodestar) in conjunction with a multiplier of between 2 and 4. *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975).

As time passed and courts were forced to wade through the voluminous, and often complicated and privileged time records, it became evident that utilization of the lodestar method had reached a point of diminishing returns. As the court noted in *In re Activision Securities Litigation*, 723 F.Supp. 1373, 1375 (9th Cir. 1989) :

The question this court is compelled to ask is, Is this process necessary? Under a cost-benefit analysis, the answer would be a resounding, No! Not only do the *Lindy Kerr* and *Johnson* analyses consume an undue amount of court time with little resulting advantage to anyone, but, in fact, it may be to the detriment of the class members. They are forced to wait until the court has done a thorough, conscientious analysis of the attorney's fee petition.

Since *Blum v. Stenson*, 465 U.S. 886 (1984), where the Supreme Court approved a percentage of the fund as being an appropriate fee award, courts have increasingly rejected the lodestar approach. This trend recognizes the fact that compensating class counsel on a percentage basis (common fund) makes good sense because 1) it is consistent with the private marketplace where contingent fee attorneys are customarily compensated on such a basis; 2) it aligns the interests of class counsel and absent class members in achieving the maximum possible resolution of the case; and 3) it augurs for the most efficient and expeditious resolution of the litigation by providing an incentive for early, yet reasonable, settlement. Class Counsel respectfully submit that the award in this case meets all those criteria, such that it should be made on a percentage basis.

One of the nation's most well respected scholars in the field of class actions and attorneys' fees, Professor Charles Silver of the University of Texas School of Law, has concluded that - among

its many other benefits - the percentage method is also far superior to the lodestar plus multiplier method in aligning the interests of class counsel with the interests of absent class members:

**The consensus that the contingent percentage approach creates a closer harmony of interests between class counsel and absent plaintiffs than the lodestar method is strikingly broad.** It includes leading academics, researchers at the RAND Institute for Civil Justice, and many judges, including those who contributed to the Manual for Complex Litigation, the Report of the Federal Courts Study Committee, and the Report of the Third Circuit Task Force. Indeed, it is difficult to find anyone who contends otherwise. No one writing in the field today is defending the lodestar on the ground that it minimizes conflicts between class counsel and absent claimants.

**It view of this, it is as clear as it possibly can be that judges should not apply the lodestar method in common fund class actions.** The Due Process Clause requires them to minimize conflicts between absent claimants and their representatives. The contingent percentage approach accomplishes this.

Charles Silver, *Due Process and the Lodestar Method: You Can't Get There From Here*, 74 Tul.L.Rev. 1809, 1819-20 (June 2000) (emphasis added; footnotes omitted).

**C. The Substantial Risk Taken By Class Counsel Justifies An Upward Adjustment From The 9<sup>th</sup> Circuit's Benchmark**

"The Ninth Circuit has adopted a benchmark of 25% in percentage of fund cases and adjusts this figure upward where the particular circumstances are extraordinary, or downward where, for example, recovery is a certainty." *Newberg on Class Actions, supra*, at page 566. The case before this honorable Court represents the classic example of when an upward adjustment to 33 1/3% is the most appropriate action to take.

When the two consolidated cases were filed, no evidence had yet been found that would arguably be viable as proof of willfulness under *Labor Code* §203. At the beginning of the case, there were theories and factual support for the primary claim of underpayment of class members at the time of termination. But, there was no guarantee that detailed and cumbersome investigation and litigation would lead to any recovery, let alone one representing a recovery up to eight and a half times the amount of the ultimately determined under payments.

While hindsight is always "20/20", it does offer an interesting perspective in this matter. Class Counsel devoted 26,701.7 hours of time (representing \$16,640,376.00 in fees) and \$572,754.85 of their own funds to bring this matter to a successful completion. Had the thousands of hours they spent sifting through over a million pages of documents, taking numerous depositions around the country, and retaining an expert (Dr. Shapiro) who was the most knowledgeable non-Wal-Mart employee in

the country in connection with defendant's computerized data systems, this case may well have been lost.<sup>8</sup> At most, it might have merely resulted in defendant being willing to reach a compromise settlement in connection with the approximately \$10 million its expert believed might be underpaid. Even had Class Counsel received a 1/3 award in that event, the fees would be in the neighborhood of \$2 million or \$3 million - literally a small fraction of the value of the fees and costs they would have devoted to this case.

Defendant is widely known to aggressively defend itself in substantial litigation, and it certainly lived up to that reputation here. As the Court's docket reflects, defendant's counsel spared no effort in an attempt to protect their client, to limit discovery, to defeat class certification, and to appeal to the 9<sup>th</sup> Circuit. Class Counsel met each of these challenges and refused to be overwhelmed by the other side. Class Counsel continually moved the matter forward, never ceding control of the case and never forgetting their obligation to protect the interests of the class by leaving no stone unturned in their case preparation.

**D. The Attorneys' Fees Requested by Class Counsel Are Well Within the Range of Fees Awarded in Comparable Cases**

The goal in a case such as this is to set a fee that approximates the probable terms of a contingent fee contract negotiated by a sophisticated attorney and client in comparable litigation. (*Lealao* at 48.) A review of class action settlements shows that the courts have historically awarded fees in the range of 20% to 50%, depending upon the circumstances of the case. See, *In re Warner Communications Sec. Lit.*, 618 F.Supp. 735 (S.D.N.Y. 1985). "[T]he fact-specific nature of these fee determinations leaves room for a wide range of awards. For example, in *Mister v. Illinois Central Gulf Railroad Co.* [S.D. Ill 1993], 40% of a common fund of \$10 million was awarded to plaintiffs' counsel in an employment discrimination class action for extraordinary representation." *Newberg, supra* at page 568. In this regard, an article in Class Action Reports points out the following percentages in multi-million dollar cases: *Construction Inc. v. National Council on Compensation Ins. Nos. 89-822*

<sup>8</sup>As part of their costs, Class Counsel have paid Dr. Shapiro over \$335,000 to assist in uncovering the key information often found deep within defendant's computerized records. That assistance proved invaluable in building this case. However, had the case been lost, that money, and the other costs advanced by Class Counsel would not have been recovered.

1 *and 89-1186* (W.D. Okla. June 7, 1993) (anti-trust; **34%**); *In re Meldridge, Inc. Securities Litigation*  
 2 (D. Or. March 19, 1992, and November 1993) 87-426 (**34%**); *Hwang v. Smith-Corona Corp.* (D.  
 3 Conn. March 12, 1992) No. 89-450 (**35.8%**).

4 In numerous employment class actions involving Wal-Mart as a defendant, fees equal to  
 5 33 1/3% of the potential maximum recovery have been awarded. See, *In re: Wal-Mart Wage and Hour*  
 6 *Employment Practices Litigation*, MDL No. 1735 (D.C. Nev 2009) In that matter, an appeal of the  
 7 district court's overruling of an objection to the attorneys' fee award was based in part on a claim that  
 8 the 33 1/3% fee award based on the potential maximum payment under the settlement agreement was  
 9 improper. The appeal was summarily dismissed by the 9<sup>th</sup> Circuit before briefing had been completed  
 10 because the Court found the appeal to be "so insubstantial as not to require further argument." See,  
 11 Exhibit 4, Order by 9<sup>th</sup> Circuit. Thus, the MDL court's award based upon the maximum potential  
 12 settlement amount was upheld as correct, which is the same basis upon which the fee award in the  
 13 matter before this Court is sought. Numerous other cases in various state courts throughout the  
 14 country have granted fee awards equal to 33 1/3% of the maximum potential recovery in cases against  
 15 this same defendant.<sup>9</sup>

#### 16 **E. The Percentage Awarded Should Mimic the Market.**

17 *Newberg on Class Actions, Fourth Edition*, vol. 4, p. 560, §14.6 contains an interesting  
 18 discussion of the concept of a market place analysis and why it is so valuable in determining a  
 19 percentage award:

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20 <sup>9</sup>Other 33 1/3% awards in class actions against Wal-Mart include *Bailey, et.al. vs. Wal-Mart*  
 21 *Stores, Inc.*, Marion County Superior Court, State of Indiana, Case No. 49D05-0008-CT-1177;  
 22 *Armijo, et.al. vs. Wal-Mart Stores, Inc., et.al.*, County of Rio Arriba, State of New Mexico, Case No.  
 23 D-0117-CV-2000002211; *Nagy et.al. vs. Wal-Mart Stores, Inc.*, Boyd County, Commonwealth of  
 24 Kentucky, Case No. 01-CI-00854; *Pickett, et.al. vs. Wal-Mart Stores, Inc., et.al.*, Memphis Judicial  
 25 District, State of Tennessee, Case No. CT-005945-03; *Willey, et.al. vs. Wal-Mart Stores, Inc., et.al.*,  
 26 Wyandotte County, State of Kansas, Case No. 01C3688; *Mussmann, et.al. vs. Wal-Mart Stores, Inc.,*  
 27 *et.al.*, Clinton County, State of Iowa, Case No. LA-27486; *Brown, et.al. vs. Wal-Mart Stores, Inc.,*  
 28 *et.al.*, Rock Island County, State of Illinois, Case No. 01 L 85; *Lerma, et.al. vs. Wal-Mart Stores, Inc.,*  
*et.al.*, Cleveland County, State of Oklahoma, Case No. CJ-2001-1395; *Carter, et.al. vs. Wal-Mart*  
*Stores, Inc., et.al.*, Colletn County, State of South Carolina, Case No. 06-CP-15-839; *Hale, et.al. vs.*  
*Wal-Mart Stores, Inc., et.al.*, Jackson County, State of Missouri, Case No. 01-CV-218710; *Ouellette,*  
*et.al. vs. Wal-Mart Stores, et.al.*, Washington County, State of Florida, Case No. 67-01-CA-326.

[Goodrich and Silver<sup>10</sup>] ... suggest that fee awards should be consistent with contingent fee arrangements negotiated in non class litigation:

1. The percentage method is consistent with and is intended to mirror practice in the private marketplace where contingent fee attorneys typically negotiate percentage fee arrangements with their clients. As Judge Posner emphasized in *In re Continental Illinois Securities Litigations*, “[t]he object in awarding a reasonable attorney’s fee...is to simulate the market...**The class counsel are entitled to the fee they would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client.**” In non-class litigations, one-third contingency fees are typical. In their concurring opinion in *Blum*, Justices Brennan and Marshall observed that “[i]n tort suits, an attorney might receive one-third of whatever the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery.”

If named plaintiffs have agreed to pay a one-third contingent fee, that is powerful evidence of a reasonable fee. One of the best ways to demonstrate the value of counsel’s work to the class is to review the consideration agreed to be paid by the named plaintiffs in their contracts. **If the named plaintiffs have employed their counsel by contingent fee agreements that obligated them to pay one-third of the recovery, it would indeed be inequitable for the members of the class, who will enjoy the benefits of this settlement without incurring the risks of bringing the claim, to pay less than the named plaintiffs.**

The complex nature of this litigation and its successful result leads to the clear conclusion that the fee request herein is reasonable. In *Cambden I Condominium Association, Inc., v. Dunkel*, 946 F. 2d 768 (11th Cir. 1991), the court identified the following as factors to be considered in arriving at a common fund fee determination: 1) the time and labor required; 2) the novelty and difficulty of the questions involved; 3) the skill requisite to perform the legal services properly; 4) the preclusion of other employment by the attorney due to the acceptance of the case; 5) the customary fee; 6) whether the fee is fixed or contingent; 7) time limitation imposed by the client or the circumstances; 8) the amount involved and results obtained; 9) the experience, reputation and ability of the attorney; 10) the undesirability of the case; 11) the nature and length of the professional relationship with the client; and 12) awards in similar cases. As previously discussed herein, and as clearly detailed in the **Time and Task Chart**, each and every one of these factors favors the award sought by Class Counsel herein.

## VI. CROSS-CHECKING THE “PERCENTAGE OF THE FUND” METHOD BY USE OF A LODESTAR CALCULATION

It is sometimes helpful to courts to “cross-check” a percentage award by employing a lodestar

<sup>10</sup> Goodrich, Frank and Silver, Reagan, *Common Fund and Common Fund Problems: Fee Objections and Class Counsel’s Response*, 17 Rev. Litig. 525 (Summer 1995).

1 with a multiplier analysis. While the lodestar method is generally considered inappropriate in a  
 2 common fund case where real cash benefits are made available to class members, its use can provide  
 3 further validation of the appropriateness of the percentage award. (See, *In re Prudential Ins. Co. of*  
 4 *America Sales Practice Litigation* 106 F. Supp.2d 721 (D.N.J. 2000).

5 In the case at bar, the declarations of Louis Marlin, Marcus Bradley, Peter Hart and J. Dana  
 6 Pinney evidence the fact that Class Counsel (including partners, associates and para-legals) devoted  
 7 26,701.7 hours of time to this litigation. The **Time and Task Chart** contains a summary at the end  
 8 which sets forth the hourly contribution by each firm.

9 Here, using the various hourly rates of the law firms who dedicated their efforts to successfully  
 10 resolving this matter, there is a total lodestar of \$16,640,376. The percentage award sought by Class  
 11 Counsel, if converted to the lodestar method, would entail a 1.72 multiplier, well within the acceptable  
 12 range.

#### 13 **A. Plaintiff's Counsels' Lodestar Is Reasonable**

14 The hourly rate employed by Class Counsel is reasonable. Plaintiff's attorneys are entitled to  
 15 the hourly rates charged by attorneys of comparable experience, reputation, and ability for similar  
 16 litigation. The background and experience of plaintiffs' counsel are fully set forth in their declarations  
 17 filed in support of this motion. The basic hourly rates listed for each firm are fair and representative  
 18 of the clear success they have had in the past in connection with class action litigation

19 Under California law, counsel are entitled to compensation for every hour reasonably spent on  
 20 the matter. *Ketchum vs. Moses*, 24 Cal. 4<sup>th</sup> 1122, 1133 (2001). Reasonableness of hours is assessed  
 21 by "the entire course of the litigation, including pretrial matters, settlement negotiations, discovery,  
 22 litigation tactics, and the trial itself . . . ." *Vo v. Las Virgenes Municipal Water Dist.* 79 Cal. App. 4<sup>th</sup>  
 23 440, 447 ) 2000). Here, counsels' sworn declarations attest to the hours spent. (See *Wershba vs. Apple*  
 24 *Computer Inc.*, 91 Cal. App. 4<sup>th</sup> 224, at 254-55 (2001) (number of hours reasonably spent may be  
 25 established by attorney declarations). The accompanying **Time and Task Chart** provides this  
 26 honorable Court with comprehensive information concerning exactly how Class Counsel spent their  
 27 time in protecting the rights of the members of this class.

28 In sum, the reasonableness of plaintiffs' lodestar is manifest. Accordingly, the question

1 becomes whether the requested 1.72 multiplier is reasonable by marketplace standards. The requested  
 2 multiplier is not only reasonable, it is on the low end of awards in comparable cases.

3 **B. The Lodestar Enhancement Is Reasonable**

4 As the Supreme Court has explained, in determining the reasonableness of attorneys' fees "the  
 5 most critical factor is the degree of success obtained." *Hensley v. Eckerhart*, 461 U.S. 424, 436  
 6 (1983); *see also Glendora Community Redev. Agency v. Demeter* 155 Cal. App. 3d 465, 475 (1984)  
 7 Here, Class Counsel succeeded resoundingly and unequivocally, obtaining substantial relief far above  
 8 the amount of the underlying claim for unpaid compensation.

9 The application of a 1.72 multiplier is comparable to what a sophisticated client would have  
 10 freely negotiated. In a case such as the one at bar, where Class Counsel have taken substantial risk  
 11 in bring the action, have faced aggressive opposition from the defense, and have been able to achieve  
 12 a result that represents a potential recovery far above the underlying claim, it is entirely appropriate  
 13 to use a multiplier to enhance the lodestar claim of counsel:

14 It is an established practice in the private legal market to reward attorneys for taking  
 15 the risk of non-payment by paying them a premium over their normal hourly rates for  
 16 winning contingency cases. *See* Richard Posner, *Economic Analysis of Law* § 21.9, at  
 17 534-35 (3d ed. 1986). Contingent fees that may far exceed the market value of the  
 18 services if rendered on a non-contingent basis are accepted in the legal profession as  
 19 a legitimate way of assuring competent representation for plaintiffs who could not  
 20 afford to pay on an hourly basis regardless whether they win or lose. *See Model Rules*  
 21 *of Professional \*1300 Conduct* Rule 1.5(a)(8) (1992); *Model Code of Professional*  
 22 *Responsibility* DR 2-106(B)(8) (1980); *Canons of Ethics* § 12, 33 A.B.A.Rep. 575, 578  
 (1908). As the court observed in *Behrens v. Wometco Enter., Inc.*, 118 F.R.D. 534, 548  
 (S.D.Fla.1988), *aff'd*, 899 F.2d 21 (11th Cir.1990), "[i]f this 'bonus' methodology did  
 not exist, very few lawyers could take on the representation of a class client given the  
 investment of substantial time, effort, and money, especially in light of the risks of  
 recovering nothing." And in *In re Union Carbide Corp. Consumer Prods. Business*  
*Sec. Litig.*, 724 F.Supp. 160, 169 (S.D.N.Y.1989), the court addressed the negative  
 impact the proscription of risk multipliers might have on the important goal of  
 furthering the purposes of federal securities laws:

23 [I]ndividuals damaged by violations of the federal securities laws should have  
 24 reasonable access to counsel with the ability and experience necessary to analyze and  
 25 litigate complex cases.... A large segment of the public might be denied a remedy for  
 violations of the securities laws if contingent fees awarded by the courts did not fairly  
 compensate counsel for the services provided and the risks undertaken.  
 For these reasons, courts have routinely enhanced the lodestar to reflect the risk of non-  
 payment in common fund cases.

27 *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299-300 (9th Cir.  
 28 1994)

1 In this case, the hours expended equate to \$16,640,376 of billable time. This enormous  
 2 investment of both time and expenses was always at risk. Had the second attempt at mediation not  
 3 been successful, Class Counsel were prepared to aggressively move the matter forward to trial on a  
 4 contingency basis. Class Counsel took an enormous risk, and they should be rewarded for assuming  
 5 that risk and obtaining a stunning result for the class. A multiplier of 1.72 represents a modest upward  
 6 adjustment of fees that properly rewards class counsel for the efforts expended as well as the results  
 7 achieved.

8 In *Wing vs. Asarco Inc.*, 114 F.3d 986 (9<sup>th</sup> Cir. 1997) the court approved an \$8 million fee in  
 9 a class action that was achieved by use of a multiplier of 2. The court noted:

10 The judge, no stranger to complex litigation, spoke in awe of class counsel's  
 11 performance, stressing the first-rate job the lawyers did, their sheer endurance, and the  
 12 exceptional results obtained, which the court viewed as especially remarkable in light  
 of the quality of opposition counsel and Asarco's record of success in this type of  
 litigation. *Id.*, at 989

13 Frankly, one could substitute the name "Wal-Mart" for "Asarco" in the above quote and find  
 14 without any hesitation that it would apply to the case at bar.<sup>11</sup> Here, the use of a conservative 1.72  
 15 multiplier results in an award equivalent to the 33 1/3% sought by Class Counsel. This "double check"  
 16 by reference to the lodestar method thus further validates the fee request presented herein.

## 17 VII. COSTS

18 Each of the plaintiffs' law firms have provided the Court, as Exhibits to counsels' declarations,  
 19 with details of the costs they have incurred in connection with this case, and the necessity for the same.  
 20 The total of all costs to date is \$572,754.85, and last page of the **Time and Task Chart** contains a  
 21 summary of these necessary costs. Class Counsel respectfully seek recovery of these costs.

## 22 CONCLUSION

23 Plaintiffs and their counsel respectfully request that this Court enter an Order:

- 24 1. Awarding Plaintiffs Danton Ballard, Nathan Lyons, Barry Smith and Michael Wiggins  
 25 each an incentive award of \$25,000;

26 <sup>11</sup>While Class Counsel certainly hopes this honorable Court is "in awe" of the work they have  
 27 done and the results accomplished, they do not presume that the Court holds such an opinion by  
 28 providing this quote. The spirit of this quote, however, can directly be applied to the efforts of Class  
 Counsel and the results achieved.

2. Awarding Class Counsel attorneys' fees in the amount of \$28,666,666;
3. Awarding Class Counsels' costs in the amount of \$572,754.85;
4. Such other and further relief as to the Court seems just and proper.

Dated: August 25, 2010

**MARLIN & SALTZMAN, LLP**  
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By: /s/  
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